

ANDREW B. SERWIN CA Bar No. 179493
 aserwin@foley.com
 KATHRYN M.S. CATHERWOOD CA Bar No. 149170
 kcatherwood@foley.com
 TAMMY H. BOGGS CA Bar No. 252538
 tboggs@foley.com
FOLEY & LARDNER LLP
 ATTORNEYS AT LAW
 3579 VALLEY CENTER DR., SUITE 300
 SAN DIEGO, CA 92130
 TELEPHONE: 858.847.6700
 FACSIMILE: 858.792.6773

Attorneys for Defendants EDRIVER, INC., ONLINE
 GURU INC., FIND MY SPECIALIST, INC.,
 SERIOUSNET, INC., RAVI K. LAHOTI, RAJ LAHOTI

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TRAFFICSCHOOL.COM, INC., a
 California Corporation; DRIVERS ED
 DIRECT, LLC, a California limited
 liability company,

Plaintiffs,

v.

EDRIVER, INC., ONLINE GURU,
 INC., FIND MY SPECIALIST, INC.,
 and SERIOUSNET, INC., California
 corporations, RAVI K. LAHOTI, an
 individual; RAJ LAHOTI, an individual;
 DOES 1 through 10,

Defendants.

Case No: CV 06-7561 PA (CWx)

**DEFENDANTS' EVIDENTIARY
 OBJECTIONS TO AND MOTION
 TO STRIKE PORTIONS OF THE
 DECLARATIONS SUBMITTED IN
 SUPPORT OF PLAINTIFFS'
 MOTION FOR ATTORNEY FEES
 AND COSTS**

Date: December 5, 2011
 Time: 1:30 p.m.
 Ctrm: 15
 Judge: Honorable Percy Anderson

Complaint Filed: November 28, 2006

Defendants Edriver, Inc., Online Guru, Inc., Find My Specialist, Inc.,
 Seriousnet, Inc., Ravi K. Lahoti, and Raj Lahoti ("Defendants") hereby object to
 and move to strike portions of the separate declarations of Mina I. Hamilton and
 Josephine A. Brosas including certain exhibits attached thereto filed by plaintiffs
 Trafficschool.com, Inc. and Drivers Ed Direct, LLC ("Plaintiffs") in support of
 Plaintiffs' Motion for Attorney Fees and Costs as set forth below.

///

1 **A. Declaration of Mina I. Hamilton**

2 1. Page 2, Lines 12-18: “On September 6, 2011, as required by this
3 Court’s Order, Plaintiffs’ counsel provided the following documents to Defendants
4 counsel by email: (a) copies of the billing records...(b)copies of the American
5 Intellectual Property Law Association (“AIPLA”) surveys for 2008 and of The
6 National Law Journal’s 2010 Billing Survey Report for the hourly rates that will be
7 claimed in Plaintiffs’ motion....”

8 Objection: The reference to the AIPLA survey for 2008 and the
9 National Law Journal’s 2010 Billing Survey Report to support the hourly rates
10 claimed in Plaintiffs’ motion is irrelevant, misleading, confusing, and prejudicial.
11 The majority of the fees and costs sought by Plaintiffs appear to have been
12 incurred in Los Angeles in 2006 and 2007. The surveys should be stricken and not
13 considered. Fed. R. Evid. 401, 403.

14 Sustain _____ Overrule _____

15 2. Page 4, Lines 1-7 and 12-20: “[H]e informed me that such will be
16 provided at a later time, when Defendants are required to provide their portion of
17 the joint statement. I recall Mr. Serwin acknowledging that the spreadsheets
18 provided were fairly self-explanatory. I also recall Mr. Serwin stating vaguely, in
19 general terms (and not as outlined on p. 3 of Defendants ‘Comments’ to the Joint
20 Statement), that Plaintiffs are not entitled to fees because they are not the
21 prevailing party in an exceptional case and that there has been no allocation....
22 Mr. Serwin volunteered that a list of the types of cases...will suffice....Mr. Serwin
23 never asked to be provided with any ‘business records showing hourly rates
24 charged in other types of litigation’ as he claims on p. 3 of Defendants’
25 ‘Comments’ to the Joint Statement.”

26 Objection: Testimony concerning statements allegedly made by
27 Mr. Serwin constitutes inadmissible hearsay and is not the best evidence of
28 Mr. Serwin’s comments or Defendants’ position. See Supplemental Declaration of

1 Andrew Serwin filed in support of Defendants' Opposition to Plaintiffs' Motion
 2 for Attorneys' Fees and Costs ("Serwin Supp. Decl."). The best evidence of
 3 Defendants' position is contained in the pleadings filed by Defendants in these
 4 proceedings. Fed. R. Evid. 801, 802.

5 Sustain _____ Overrule _____

6 3. Page 5, Lines 1-5: "On September 19, 2011, Mr. Serwin responded to
 7 the above email, confirming that he did not expect case names and that at
 8 minimum, he just wanted to know 'which attorney worked on these cases'. This is
 9 inconsistent with his claim on p. 3 of Defendants' 'Comments' that he asked for
 10 'business records showing hourly rates charged in other types of litigation'."

11 Objection: Testimony concerning statements allegedly made by
 12 Mr. Serwin constitutes inadmissible hearsay and is not the best evidence of
 13 Mr. Serwin's comments or Defendants' position. The best evidence is contained in
 14 the pleadings filed by Defendants in these proceedings. Fed. R. Evid. 801, 802.

15 Sustain _____ Overrule _____

16 4. Page 7, Lines 3-5, Exhibit F: "I have also reviewed the various
 17 invoices for costs and expenses generated in this matter which support the costs
 18 and expenses being sought by Plaintiffs in this Motion. Attached hereto as
 19 Exhibit F are true and correct copies of these invoices."

20 Objection: Exhibit F, which consists of third-party invoices for
 21 alleged costs and expenses sought by Plaintiffs, constitutes inadmissible hearsay
 22 and lacks foundation. Fed. R. Evid. 602, 801, 802. Moreover, the invoices contain
 23 substantial redactions and thus are not compete copies and should be stricken.

24 Sustain _____ Overrule _____

25 5. Page 7, Lines 11-17, Exhibit G: "Attached hereto as Exhibit G is a
 26 true and correct copy of excerpts from reports based on surveys periodically
 27 conducted and prepared by the [AIPLA] and published every other year to
 28 determine the billing rates in intellectual property cases. As can be seen from the

1 report itself, by 2008 in the Los Angeles area, the average hourly billing rate for
 2 partners was \$503 and the average hourly billing rate for associates in the
 3 Los Angeles area was \$349.”

4 Objection: Excerpts from a report prepared by the American
 5 Intellectual Property Law Association and testimony concerning the purported
 6 average hourly billing rates in Los Angeles for 2008 lack foundation, constitute
 7 inadmissible hearsay, and are irrelevant, misleading, confusing, and prejudicial.
 8 The report is incomplete and the data underlying the survey results is unknown to
 9 Defendants. The majority of the fees and costs sought by Plaintiffs were incurred
 10 in Los Angeles in 2006 and 2007 (not 2008). The survey, Exhibit G, should be
 11 stricken and not considered. Fed. R. Evid. 401, 403, 602, 801, 802.

12 Sustain _____ Overrule _____

13 6. Page 7, Lines 18-25, Exhibit H: “Attached hereto as Exhibit H is a
 14 true and correct copy of The National Law Journal’s 2010 Billing Survey Report.
 15 The rates charged to Plaintiffs in this case are well below most of those charged by
 16 the nation’s 250 largest law firms, including defense counsel at Foley & Lardner,
 17 who reportedly charge an average rate of \$654 an hour for partners, and \$426 an
 18 hour for associates. It is also reported that at Sheppard Mullin Richter and
 19 Hampton (former defense counsel who handled the district court proceedings),
 20 partners bill at a high-end firm wide rate of \$820 and associates at a firm wide
 21 high-end rate of \$620 (average rates were not reported).”

22 Objection: The National Law Journal’s 2010 Billing Survey Report
 23 and testimony concerning Foley & Lardner LLP’s alleged national average billing
 24 rates and Sheppard Mullin Richter and Hampton’s *high-end* national firm wide
 25 rates lack foundation, constitute inadmissible hearsay, and are irrelevant,
 26 misleading, confusing, and prejudicial. The majority of the fees and costs sought
 27 by Plaintiffs were incurred in Los Angeles in 2006 and 2007 (not 2010). The data
 28 underlying the nationwide survey results is unknown to Defendants. The survey,

1 Exhibit H, should be stricken and not considered. Fed. R. Evid. 401, 403, 602,
2 801, 802.

3 Sustain _____ Overrule _____

4 7. Page 7, Lines 27-28 and Page 8, Line 1: “The approximately 2,679.7
5 hours of attorney time spent in proceedings before the district court was actually
6 incurred, necessary and reasonable in order to complete the multiple and varied
7 tasks related to the following general categories....”

8 Objection: Testimony that 2679.7 hours of attorney time “was
9 actually incurred, necessary and reasonable” lacks foundation and constitutes
10 improper opinion testimony and a legal conclusion. Fed. R. Evid. 602, 701.

11 Sustain _____ Overrule _____

12 8. Page 8, Lines 18-24: “The fees being sought herein is [sic]
13 \$2,867,616. This amount reflects the lodestar figure of \$1,433,808, adjusted
14 upward with a 2.0 multiplier. The \$1,433,808 lodestar figure was calculated by
15 multiplying the number of hours reasonably expended on proceedings before the
16 district court prior to or excluding the appellate proceedings (i.e., 2,679.7),
17 including this Motion (i.e., 210 [incorporating time estimated for the Reply and
18 any hearing]) and the preparation of the Joint Status Report (D.E. #306) (i.e., 115)
19 by the reasonable hourly rates (i.e., \$503 for partners and \$349 for associates).”

20 Objection: Testimony concerning whether the number of hours spent
21 on proceedings and whether the rates taken from a 2008 report (when the majority
22 of the billings occurred in 2006 and 2007) are reasonable lacks foundation and
23 constitutes improper opinion testimony and a legal conclusion and is argument not
24 proper for a declaration. Fed. R. Evid. 602, 701.

25 Sustain _____ Overrule _____

26 9. Page 9, Lines 8-9: “Attached hereto as Exhibit I are true and correct
27 copies of the aforementioned attorneys’ website resumes.”
28

1 Objection: Exhibit I, which consists of various attorneys' website
 2 resumes, lacks foundation and constitutes inadmissible hearsay. Defendants move
 3 to strike Exhibit I. Fed. R. Evid. 602, 801, 802.

4 Sustain _____ Overrule _____

5 10. Page 9, Lines 18-26: "Mr. David N. Makous, lead counsel in this
 6 case, has practiced intellectual property law since 1978 and is managing partner of
 7 the firm's intellectual property practice group and has significant and extensive
 8 experience with Lanham Act and false advertising cases. He has managed
 9 numerous IP cases....He is a frequent speaker and lecturer, and has numerous
 10 published articles."

11 Objection: Testimony concerning David N. Makous' experience
 12 lacks foundation and contains improper conclusions. Fed R. Evid. 602.

13 Sustain _____ Overrule _____

14 11. Page 10, Lines 1-8: "Mr. Daniel C. DeCarlo has practiced intellectual
 15 property and complex litigation since 1992....He frequently lectures to business
 16 groups on intellectual property issues and also has numerous published articles."

17 Objection: Testimony concerning Daniel C. DeCarlo's experience
 18 lacks foundation. Fed R. Evid. 602.

19 Sustain _____ Overrule _____

20 12. Page 10, Lines 9-11: "The associates who worked on this case have
 21 practiced and specialized in intellectual property law, since becoming members of
 22 the bar, and have at least three (3) to six (6) years of trial and litigation experience
 23 on Lanham Act cases."

24 Objection: Testimony concerning the experience of the associates
 25 that worked on this case lacks foundation. Fed R. Evid. 602.

26 Sustain _____ Overrule _____

27 13. Page 10, Lines 13-17, Exhibit J: "Attached hereto as Exhibit J is a
 28 true and correct copy of a print out of the DMV.ORG splash screen as it appeared

1 on or about March 23, 2009. As can be seen in this print out, there are two drop
 2 down menus on the screen. These drop down menus appeared while the page was
 3 downloading and then disappeared once the page fully loaded in the web browser.”

4 Objection: Exhibit J, which allegedly consists of the DMV.ORG
 5 splash screen on or about March 23, 2009, and testimony as to what happened
 6 upon visiting the website lack foundation, are irrelevant, and are not specific to
 7 time and incomplete. Exhibit J should be stricken. Fed R. Evid. 401, 403, 602.
 8 Declaration of Raj Lahoti in Support of Joint Status Report, filed on September 6,
 9 2011 as Doc. No. 306 (“Lahoti Joint Status Decl.”) and Declaration of Raj Lahoti
 10 in Support of Defendants’ Opposition to Plaintiffs’ Motion for Attorneys’ Fees and
 11 Costs (“Lahoti Attorneys’ Fee Objection Decl.”).

12 Sustain _____ Overrule _____

13 14. Page 10, Lines 18-19, Exhibit K: “Attached hereto as Exhibit K is a
 14 true and correct copy of a screen shot of the DMV.ORG splash screen as it
 15 appeared on or about August 25, 2009.”

16 Objection: Exhibit K, which allegedly consists of the DMV.ORG
 17 splash screen on or about August 25, 2009, lacks foundation, is irrelevant, and is
 18 not specific to time and are incomplete. Exhibit K should be stricken. Fed R.
 19 Evid. 401, 403, 602. See also Lahoti Joint Status Decl. and Lahoti Attorneys’ Fee
 20 Objection Decl.

21 Sustain _____ Overrule _____

22 15. Page 10, Lines 20-21, Exhibit L: “Attached hereto as Exhibit L is a
 23 true and correct copy of a screen shot of the DMV.ORG splash screen as it
 24 appeared on or about August 26, 2009.”

25 Objection: Exhibit L, which allegedly consists of the DMV.ORG
 26 splash screen on or about August 26, 2009, lacks foundation, is irrelevant, and is
 27 not specific to time and is incomplete. Exhibit L should be stricken. Fed R. Evid.

28

1 401, 403, 602. See also Lahoti Joint Status Decl. and Lahoti Attorneys' Fee
 2 Objection Decl.

3 Sustain _____ Overrule _____

4 16. Page 10, Lines 22-26, Exhibit M: "Attached hereto as Exhibit M is a
 5 true and correct copy of a screen shot of the DMV.ORG splash screen as it
 6 appeared on or about July 28, 2011. Defendants have removed "Unofficial Guide
 7 to the DMV" from their license plate logo. Additionally, there was a delay of
 8 approximately two to three seconds before the disclaimer text (in faint grey font)
 9 appeared right below the browser toolbar."

10 Objection: Exhibit M, which allegedly consists of the DMV.ORG
 11 splash screen on or about July 28, 2011, and testimony as to what happened upon
 12 visiting the website lack foundation, are irrelevant, and are not specific to time and
 13 are not complete. Exhibit M should be stricken. Fed R. Evid. 401, 403, 602. See
 14 also Lahoti Joint Status Decl. and Lahoti Attorneys' Fee Objection Decl.

15 Sustain _____ Overrule _____

16 17. Page 10, Lines 27-28, Exhibit N and Page 11, Lines 1-2: "Attached
 17 hereto as Exhibit N is a true and correct copy of a screen shot of the DMV.ORG
 18 splash screen as it appeared on or about November 1, 2011. Again, there was a
 19 delay of approximately two to three seconds before the disclaimer text (in faint
 20 grey font) appeared right below the browser toolbar."

21 Objection: Exhibit N, which allegedly consists of the DMV.ORG
 22 splash screen on or about November 1, 2011, and testimony as to what happened
 23 upon visiting the website lack foundation, are irrelevant, and are not specific to
 24 time and are incomplete. Exhibit N should be stricken. Fed R. Evid. 401, 403,
 25 602. See also Lahoti Joint Status Decl. and Lahoti Attorneys' Fee Objection Decl.

26 Sustain _____ Overrule _____

1 18. Page 11, Lines 6-8, Exhibit O: “Attached hereto as Exhibit O are true
2 and correct copies of screen shots which I obtained on or about September 20,
3 2011 from Defendants’ DMV.org website and Facebook ‘wall’.”

4 Objection: Exhibit O, which allegedly consists of various screen
5 shots from the DMV.org website and from DMV.org’s Facebook wall on or about
6 September 20, 2011, lacks foundation, is irrelevant, is not specific to time, and
7 constitutes inadmissible hearsay. The comments inserted on the various screen
8 shots (author unknown) also lack foundation, constitute improper opinion
9 testimony, and amount to speculation. The comments allegedly made by Tom
10 Pniewski on the last page of Exhibit O also lack foundation and constitute
11 inadmissible hearsay. Exhibit O should be stricken. Fed. R. Evid. 401, 403, 602,
12 701, 801, 802. See also Lahoti Joint Status Decl. and Lahoti Attorneys’ Fee
13 Objection Decl.

14 Sustain _____ Overrule _____

15 19. Page 11, Lines 11-13: “According to a 2003 DMV study, there are
16 approximately 20,000 new provisional licenses issues monthly. This includes all
17 drivers under the age of 18.”

18 Objection: Testimony concerning a DMV study concerning the
19 number of provisional licenses issued in 2003 lacks foundation, constitutes
20 inadmissible hearsay, and is irrelevant. Fed. R. Evid. 401, 403, 602, 801, 802.

21 Sustain _____ Overrule _____

22 20. Page 11, Lines 14-19: “According to the US DOT, FHA (United
23 States Department of Transportation, Federal Highway Administration) report for
24 2009, there were 236,358 licensed drivers aged 16 & 17 in CA. The average age
25 according to the CA DMV study noted above for a provisional license being issued
26 is 16 ½. The same report showed there were 3,836,929 licensed drivers aged <16,
27 16, 17 in the entire United States.”
28

1 Objection: Testimony concerning a 2009 report allegedly made by
2 the US DOT and FHA lacks foundation, constitutes inadmissible hearsay, and is
3 irrelevant. Fed. R. Evid. 401, 403, 602, 801, 802.

4 Sustain _____ Overrule _____

5 21. Page 11, Lines 22-24, Exhibit P: “Attached hereto as Exhibit P is a
6 true and correct copy of an article dated July 9, 2011 entitled ‘DMV.ORG
7 Surpasses 50K ‘Likes’ on Facebook’ which I printed from www.onlineguru.com
8 on November 3, 2011.”

9 Objection: Exhibit P, which is an article dated July 9, 2011
10 concerning the alleged number of “likes” on DMV.org’s Facebook page, lacks
11 foundation, constitutes inadmissible hearsay, and is irrelevant. Fed. R. Evid. 401,
12 403, 602, 801, 802.

13 Sustain _____ Overrule _____

14 **B. Declaration of Josephine A. Brosas**

15 22. Page 2, Lines 16-28 and Page 3, Lines 1-4: “I recall Mr. Serwin
16 stating that Plaintiffs are not entitled to fees because they are not the prevailing
17 party in an exceptional case and that there has been no allocation....Mr. Serwin
18 never asked to be provided with any ‘business records showing hourly rates
19 charged in other types of litigation’ as he claims on p. 3 of Defendants’
20 ‘Comments’ to the Joint Statement.”

21 Objection: Testimony concerning statements allegedly made by Mr.
22 Serwin constitutes inadmissible hearsay and is not the best evidence of Mr. Serwin
23 comments or Defendants’ position. The best evidence of Defendants’ position is
24 contained in the pleadings filed in these proceedings. Fed. R. Evid. 801, 802. See
25 also Serwin Suppl. Decl.

26 Sustain _____ Overrule _____

27 23. Page 3, Lines 27-28 and Page 4, Lines 1-2: “I have also reviewed the
28 various invoices for costs and expenses generated in this matter which support the

1 costs and expenses being sought by Plaintiffs in this Motion. Attached to the
2 Declaration of Mina I. Hamilton as Exhibit F are true and correct copies of these
3 invoices.”

4 Objection: Testimony concerning Exhibit F, which consists of third-
5 party invoices for alleged costs and expenses sought by Plaintiffs, constitutes
6 inadmissible hearsay and lacks foundation. Fed. R. Evid. 602, 801, 802.

7 Sustain _____ Overrule _____

8 24. Page 4, Lines 27-28 and Page 5, Lines 1-5: “The fees being sought
9 herein is \$2,867,616. This amount reflects the lodestar figure of \$1,433,808,
10 adjusted upward with a 2.0 multiplier. The \$1,433,808 lodestar figure was
11 calculated by multiplying the number of hours reasonably expended on
12 proceedings before the district court prior to or excluding the appellate proceedings
13 (i.e., 2,679.7), including this Motion (i.e., 210 [incorporating time estimated for the
14 Reply and any hearing]) and the preparation of the Joint Status Report (D.E. #306)
15 (i.e., 115) by the reasonable hourly rates (i.e., \$503 for partners and \$349 for
16 associates).”

17 Objection: Testimony concerning whether the number of hours spent
18 on proceedings and whether the rates taken (presumably) from a 2008 report are
19 reasonable lacks foundation and constitutes improper opinion testimony. Fed. R.
20 Evid. 602, 701.

21 Sustain _____ Overrule _____

22 25. Page 5, Lines 6-9: “I prepared Tables 2 through 4 attached to the
23 Motion based on my review of the billing records and invoices, Excel
24 spreadsheets, and the AIPLA and NLJ reports true and correct copies of which are
25 attached as Exhibits G and H, respectively, to the Hamilton declaration.”

26 Objection: The reference to the AIPLA survey for 2008 and the
27 NLJ’s 2010 Billing Survey Report is irrelevant, misleading, confusing, and
28 prejudicial. The majority of the fees and costs sought by Plaintiffs were incurred


1 in Los Angeles in 2006 and 2007. The survey and testimony relating thereto
2 should be stricken. Fed. R. Evid. 401, 403.

3 Sustain _____ Overrule _____

4 Defendants respectfully request that the Court sustain the above objections
5 and strike the corresponding evidence.

6
7 Dated: November 14, 2011

FOLEY & LARDNER LLP

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9
10 By:  KATHRYN M.S. CATHERWOOD
11 Attorneys for Defendants
12 EDRIVER, INC., ONLINE GURU
13 INC., FIND MY SPECIALIST, INC.,
14 LAHOTI, RAJ LAHOTI
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